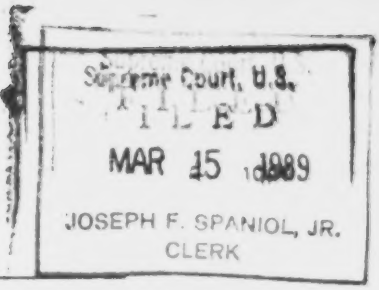
88-1693



NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

RAPHAEL G. KAZMANN, P. E.
PETITIONER

VERSUS

THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY, ET AL.
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACK N. ROGERS
MICHAEL R. CONNELLY
ROGERS & CONNELLY
604 St. Ferdinand
Baton Rouge, LA
70802-6187
(504) 344-4369
Counsel for
Petitioner

QUESTION PRESENTED

Whether Petitioner, as a citizen acting in his capacity as a ratepayer and/or taxpayer of a municipality, has standing under the provisions of 33 USC 1365 and/or 5 USC 702 et seq. to sue the Environmental Protection Agency in order to set aside orders of the EPA imposed on said municipality.

TABLE OF CONTENTS

Opinions Below.....1

Jurisdiction.....2

Constitutional Provisions Involved.....3

Statement of the Case.....5

Reasons for the Writ.....11

Conclusion.....37

Appendix.....41

TABLE OF AUTHORITIES

CASES:

Appalachian Power Company vs. Train
(1976 CA 4) 545 F 2d 1351.....32

Association of Data Processing
Service Organizations vs. Camp
(US S Ct 1970) 397 US 150,
25 L Ed 2d 184, 90 S Ct 827...18,19

Atlantic City Municipal Utilities
Authority vs. Regional Administrator
(US Dist Ct D NJ 1985)
616 F Supp 722.....18

CPC International, Inc., et al.
vs. Train (1975 CA 8) 515 F 2d 1032...32

Hill vs. Tennessee Valley Authority
(1977 CA 6) 549 F 2d 1064.....18

International Federation of
Professional and Technical
Engineers vs. Williams
(1974 E D VA) 389 F Supp 287
Aff'd w/o opinion (CA 4 VA)
510 F 2d 966.....28

Loveladies Property Owners'
Association, Inc. vs. Raab
(US Dist Ct D NJ 1975)
430 F Supp 276.....18

Marathon Oil vs. Environmental
Protection Agency (1972 CA 9)
564 F 2d 1253.....32

Motor Vehicle Manufacturers'
Association vs. State Farm
Mutual Insurance Co.
(US S Ct 1983) 463 US 29,
77 L Ed 2d 443, 103 S Ct 2856....32

National Association of Metal Finishers vs. EPA (CA 3 1983) 719 F 2d 624.....34

Public Citizen vs. Lockheed Aircraft Corporation (1977) 184 App DC 133, 565 F 2d 708.....30

Sierra Club vs. Hickel (1970 CA 9 Cal) 433 F 2d 24 Aff'd 405 US 727.....30

U. S. CONSTITUTIONAL ARTICLES:

Article 3, Section 2 (1).....3,19

Fourteenth Amendment.....4

STATUTES:

5 USCS 702 (Administrative Procedure Act).....5,10,26,27 28,29,30

5 USCS 704.....34

5 USCS 705.....36

5 USCS 706.....35

28 USCS 1346.....5,10,27,28

33 USCS 1251.....6,20,32

33 USCS 1281.....23

33 USCS 1365 Section (a)(2).....15,19,24 27,29

Legislative History, Water Pollution Control, P.L. 92-500 (p. 3738, 3744, 3747).....16, 17

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Raphael G. Kazmann, P. E., prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 16, 1988.

CITATION TO OPINIONS BELOW

The opinions of the United States District Court, Middle District of Louisiana, were rendered by minute entry on September 8, 1987, in C. A. No. 87-210-A, entitled Raphael G. Kazmann, P. E., Individually and On Behalf of All Other Individuals Similarly Situated vs. United States Environmental Protection Agency, Through Its Administrator, Lee A. Thomas, and the City/Parish of East Baton Rouge, and a Ruling on Motion to Dismiss was rendered on May 5, 1988, in C. A. No. 87-1016-A, entitled the same as above.

By opinion rendered December 16, 1988, the United States Court of Appeals for the Fifth Circuit affirmed the lower Court's decision in an unpublished opinion in Case No. 88-3415.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 16, 1988. The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article 3, Section 2, Clause 1.

Subjects of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, --to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the Untied States shall be a Party; --to Controversies between two or more States; --between a State and Citizens of another State; --between citizens of different States; --between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

AMENDMENT 14, Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

SUMMARY:

Suit was originally filed by Raphael G. Kazmann, P. E., individually and on behalf of all other individuals similarly situated against the United States Environmental Protection Agency through its Administrator, Lee A. Thomas, and the City/Parish of East Baton Rouge. Plaintiffs sought relief under the provisions of 28 USC 1346 and 5 USC Section 702, et seq., to prohibit the Environmental Protection Agency and the City/Parish Government of East Baton Rouge from entering into a consent decree which would order the expenditure of more than Two Hundred Forty Million Dollars by the City/Parish Government to construct secondary sewage treatment for East Baton Rouge Parish. Plaintiffs contend that such secondary sewage treatment is

unnecessary and would not fulfill the requirements of the Clean Water Act (now the Water Quality Act of 1987) and that, prior to a consent decree being entered into or an order being issued by the EPA, there should have been public hearings held by the EPA at which evidence could be presented showing that the construction was unnecessary. Accordingly, plaintiffs contend that the EPA, by failing to hold such public hearings, violated the Administrative Procedure Act when it is read in conjunction with the provisions of 33 USC 1251, et seq. (The Clean Water Act).

Defendants filed a motion to dismiss the complaint on the grounds that the issues of standing and jurisdiction had been previously adjudicated in a prior suit filed by plaintiffs under the provisions of the Clean Water Act. The matter was considered on defendants' Motion to Dismiss before the Honorable

John V. Parker, Chief Judge of the Middle District of Louisiana, and judgment was rendered dismissing plaintiffs' complaint on May 10, 1988.

FACTS AND PRIOR PROCEEDINGS:

This case involves a suit by taxpayers and citizens of East Baton Rouge Parish seeking injunctive relief against the United States Environmental Protection Agency (hereinafter referred to as the EPA) and the City of Baton Rouge and Parish of East Baton Rouge (hereinafter referred to as the City/Parish).

In November 1982, the City/Parish and the EPA entered into a Consent Decree. Paragraph 4 of the Decree sets forth its objectives and reads as follows:

> "All plans, studies, monitoring, remedial, and maintenance programs described in this Consent Decree or resulting from the acitivities

> required by this Decree shall have as their objective causing the Central Treatment Plant owned and operated by Baton Rouge, to come into and remain in compliance with National Pollutant Discharge Elimination System (NPDES) Permit Number LA0036421."

It has been the contention of the EPA that the City/Parish had failed to comply with the requirements of the Consent Decree, therefore the EPA was threatening to fine the City/Parish and seeking a new Consent Decree. The City/Parish at several times requested administrative hearings in order to have a variance considered, but such hearings had been denied by the EPA. As a result citizens and taxpayers of East Baton Rouge Parish and the City of Baton Rouge, represented by Raphael G. Kazmann, P. E., plaintiff herein, filed suit in U. S. District Court for the Middle District of Louisiana seeking an injunction to prohibit the EPA and the City/Parish from proceeding with a new Consent Decree

until such time as hearings had been held. At the hearing on their request for injunctive relief, plaintiffs intended to offer evidence in support of the following facts:

1. The City/Parish was, in fact, in substantial compliance with the Clean Water Act;

2. The EPA had failed to follow proper administrative procedures in this matter;

3. If proper administrative procedures were followed, it would be seen that the EPA requirements of the City/Parish did not further the goals of the Act and are not cost effective and that they impose an economic hardship on the Baton Rouge community, without need.

In response to this citizens' suit, the City and the Parish initially joined with Raphael Kazmann and adopted the pleadings filed by him as their own. The

EPA, on the other hand, responded by filing a Motion to Dismiss the complaint for failure to state a claim upon which relief could be granted. Just three days prior to the Court's hearing on the EPA's Motion to Dismiss, the City and Parish decided to change their position and adopted the EPA's Motion to Dismiss.

Ultimately, the District Court ruled that plaintiff was without standing to assert rights on behalf of the City and Parish which they had chosen not to assert on their own behalf. Other than appeal from that decision, plaintiff sought relief under the provisions of 28 USC 1346 and 5 USC Section 702 et seq. in a new suit filed in U. S. District Court. Defendants' Motion to Dismiss was granted in that matter on May 5, 1988, on the basis that the issues of standing and jurisdiction had been previously adjudicated in the prior suit. That decision was timely appealed to the

United States Court of Appeals, Fifth Circuit, which rendered a decision on December 16, 1988, affirming the actions of the Lower Court and dismissing plaintiff's appeal.

REASONS FOR GRANTING WRITS

Plaintiff is one of a group of citizens and taxpayers in an economically depressed community which has been ordered by the EPA to spend over Two Hundred Forty Million Dollars on secondary sewerage treatment which the EPA claims is necessary to bring the Parish of East Baton Rouge into compliance with the Clean Water Act. The plaintiff, on the other hand, has accumulated a substantial body of scientific evidence which indicates that the order issued by the EPA for secondary treatment is counter-productive and that it will not meet the goals of the Clean

Water Act, either in cleaning up our nation's waterways and/or doing it in a cost-effective manner. Plaintiff has, from the beginning, sought only the opportunity to present this evidence at a public hearing to be held by the EPA which he believes is necessary before the order can be issued to the City/Parish requiring the expenditure of funds on secondary treatment.

Unfortunately for plaintiff, he has been thwarted in his attempts to get a public hearing on this matter by the Court's ruling that he lacks standing to force the EPA, through the Federal Courts, to have such a public hearing. In its opinion in the case Raphael G. Kazmann, P. E., Individually and On Behalf of All Other Individuals Similarly Situated vs. United States Environmental Protection Agency, through its Administrator, Lee A. Thomas, and the

City/Parish of East Baton Rouge, Number 87-210-A, the District Court stated the following:

> "Plaintiff may be entirely correct in his claim that EPA is mandating superfluous treatment standards and that the local governing bodies are entitled to an administrative hearing before they can be required to provide that treatment. But the local elected officials whose duty it is to make the decision to demand or not to demand such a hearing, have apparently decided to forego it. That is their decision to make."

It is plaintiff's contention that it is, in fact, not entirely the decision of the local governing body to make. It is plaintiff and the other taxpayers and rate-payers of the City of Baton Rouge and the Parish of East Baton Rouge who will bear the burden of paying for the secondary sewerage treatment ordered by the EPA and of paying any fines imposed by the EPA on local governments for failure to comply with EPA requirements.

It is also the citizens, taxpayers and rate-payers who will bear the burden of any economic dislocation resulting from the expenditure of these funds and also the loss of any other municipal services which could have been provided by funds which are diverted to fulfill the requirements of the EPA.

I.

THE COURT SHOULD DETERMINE WHAT CONSTITUTES STANDING UNDER THE PROVISIONS OF THE CLEAN WATER ACT

In the first action filed by plaintiff in this matter, Civil Action No. 87-0210, entitled "Raphael Kazmann, P. E., et al. vs. United States Environmental Protection Agency, et al.," plaintiff was originally joined in the suit by the government of the City of Baton Rouge and the Parish of East Baton Rouge, which clearly gave them standing to litigate the issues which they presented. However, shortly before the

hearing on defendant EPA's Motion to Dismiss, the City/Parish switched sides and joined with the EPA in asking that plaintiff's Motion be dismissed. As a result, the District Court found that there was no standing on behalf of plaintiff and, therefore, that the Court had no jurisdiction to hear the complaint. In that original complaint, however, plaintiff had relied exclusively on jurisdiction under the provisions of 33 USC 1365, which is the citizens' suit provision of the Clean Water Act. The EPA had argued to the Court that the legislative history of the Clean Water Act indicated that the intent was to limit citizens' suits under 33 USC 1365 to citizens who had suffered some injury personal to them. Plaintiff argued that this was not the case and, in fact, cited portions of the legislative history to support his claim:

"An essential element in any control program involving the nation's waters is public participation. The public must have a genuine opportunity to speak on the issue of protection of its waters. The Committee has therefore established requirements to provide opportunity for public hearings by the Federal government, or if State participation is approved by the Administrator, the State, and other provisions to make available to the public all relevant information surrounding a discharge source and the control requirements placed on it. This includes the deposit of any permit, and the conditions thereto, in a place of ready public access. The scrutiny of the public and the exercise of authority under this section is extremely important in insuring expeditious implementation of the authority and a high level of performance by all levels of government and discharge sources." (Emphasis added) Legislative History, Water Pollution Control, P. L. 92-500 (p. 3738).

"Section 505 -- Citizen Suits: Anyone may initiate a civil suit against any person who is alleged to be in violation of an effluent limitation or a Federal or State abatement order, or against the administrator for failure to perform a non-discretionary

duty." Legislative History, Water Pollution Control, P. L. 92-500 (p. 3744).

"As pointed out, the Committee bill would provide in the citizen suit provision that actions will lie against the administrator for failure (to) exercise his duties under the Act, including his enforcement duties..." Legislative History, Water Pollution Control, P. L. 92-500 (p. 3747).

"In addition to violations of Section 301(a) citizens are granted authority to bring enforcement actions for violations of schedules or timetables of compliance and effluent limitations under Section 301, standards of performance under Section 306, prohibitions or effluent standards under Section 307, provisions of certification under Section 401, and any condition of any permit issued under Section 402. (Emphasis added) Legislative History, Water Pollution Control, P. L. 92-500 (p. 3744).

Plaintiff contended that the reading of the Legislative History showed that the citizens' suit provisions of the Act were much broader than the interpretation offered by the counsel for

the EPA. In Loveladies Property Owners Association, Inc. vs. Raab, (U. S. Dist Ct D New Jersey 1975) 430 F Supp 276, the Court found that a property owners association had standing under the provisions of 33 USC 1365 since they alleged "injury-in-fact." Included in the alleged injuries were aesthetic and recreational benefits as well as an economic interest. Raphael Kazmann has made specific allegations in his complaint of his and other taxpayers' economic interests. See also Association of Data Processing Service Organizations vs. Camp (U. S. Sup Ct 1970) 397 US 150, 25 L Ed 2d 184, 90 S Ct 827 and Atlantic City Municipal Utilities Authority vs. Regional Administrator (U. S. Dist Ct D New Jersey 1985) 616 F Supp 722.

It is also important to notice that, in the case of Hill vs. Tennessee Valley Authority (1977 C A 6) 549 F 2d 1064, the Court granted standing to

environmentalists to protect the interests of the "snail darter" under provisions of 16 USC 1540, the citizen suit provisions of the Endangered Species Act. The language of Section (g)1(c) of that provision is almost identical in content to Section (a)2 of 33 USC 1365.

Plaintiff contends that his claim for standing in this matter clearly falls within the applicable tests provided in Association of Data Processing Service Organizations, Inc. vs. William B. Camp, supra. There, the Court ruled that the question of standing to sue in the Federal Courts is to be considered in the framework of Article 3 of the U. S. Constitution, and plaintiff specifically refers to Section 2, Clause 1 of Article 3. Further, the Court required of plaintiffs that they show that there was an injury in fact to them and that the interests sought to be protected by a

plaintiff is arguably within the zone of interests protected or regulated by a U.S. Statute or Constitutional guarantee. Plaintiff contends that the economic well-being of his community and himself, as well as the issue regarding the promotion of and meeting of the goals of the Clean Water Act all fall within the categories cited above.

The economic consequences have already been cited in this petition, but the question in regard to meeting the goals of the Clean Water Act needs to be discussed further. Specifically, plaintiff refers to the legislative goals and intent of the Clean Water Act which are stated in 33 USC 1251, which reads, in pertinent part:

> "(a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective, it is hereby declared that: Consistent with the provisions of this Act --

(1) It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) It is the national goal that, wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation in wildlife and on the water be achieved by July 1, 1983;

(3) It is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) It is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) It is the national policy that area wide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) It is the national policy that a major research and development effort be made to develop

technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of States and to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, reservation and enhancement) of land and water resources, and to consult with the administrator in the exercise of authority under this Act. It is the policy of Congress that the States manage the construction grant program under the Act and implement the permit programs under Sections 402 and 404 of this Act (33 USC 1342, 1344). It is further the policy of the Congress to support and aid research relating to the prevention, reduction and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction and elimination of pollution."

In the section of the Act dealing with "Grants for Construction of Treatment Works" which is directly

applicable to the situation in East Baton Rouge Parish, the Congress elaborated further on its purposes. The pertinent parts of 33 USCS 1281 read as follows:

> "(a) It is the purpose of this title to require and to assist the development and implementation of waste treatment management plans and practices which will achieve the goals of this Act.
>
> (b) Waste treatment management plans and practices shall provide for the application of the best practicable waste treatment technology before any discharge into receiving waters, including reclaiming and recycling of water, and confined disposal of pollutants so they will not migrate to cause water or other environmental pollution and shall provide for consideration of advanced waste treatment techniques.
>
> (c) To the extent practicable, waste treatment management shall be on an areawide basis and provide control or treatment of all point and nonpoint sources of pollution, including in place or accumulated pollution sources." (emphasis added)

In order to meet the intent and goals of Congress, the Administrator of the Environmental Protection Agency (hereinafter referred to as the "Administrator") is empowered to take certain actions and to compel others, including municipalities and private industries, to take certain actions. Among other things, the Administrator is entitled to set effluent limitations and compel municipalities to comply with them. However, the power of the EPA is not unlimited.

Plaintiff therefore contends that the citizens' suit provisions of the Clean Water Act, 33 USC 1365, allow a citizen to bring a suit against the Administrator for failure to perform a non-discretionary duty even when the allegations of the citizen are to the effect that the Administrator is failing to meet the goals of the Act by ordering unnecessary expenditures on a non-cost-

effective basis. Plaintiff further contends that failure to provide standing to citizens in such circumstances, particularly when standing has been denied by a political ploy such as that used by the City/Parish of Baton Rouge in switching sides shortly before the hearing on this matter, amounts to a violation of equal protection under the Fourteenth Amendment to the U. S. Constitution. Specifically, in this case, the violation consisted of the City acting under color of State law, lulling the plaintiff into a false sense of security by joining with them in litigation and then abandoning them shortly before a hearing was to be held, but too late for plaintiff to take any other action, thereby leaving its citizens in an untenable position of facing a standing question which heretofore would not have existed.

II.

THE SECOND SUIT FILED BY PLAINTIFF ESTABLISHED STANDING UNDER DIFFERENT LEGAL GROUNDS

Plaintiff contends that the District Court and the Court of Appeals erred manifestly in their decision that plaintiff had not asserted a new cause of action by making its second complaint under the provisions of the Administrative Procedures Act, 5 USC Section 702, et seq., and that the issue of standing had already been decided in previous litigation.

Plaintiff asserts that, although the same parties were involved and the same substantive issues regarding the actions of the EPA were alleged in the second litigation, the grounds for standing and jurisdiction of the Court were entirely different and, therefore, raised new issues and a new cause of action which should have been decided by

the District Court on the basis of the merits of the new complaint and not on the previously decided case involving only one section of the Clean Water Act.

Plaintiff contends that in the case presently before this Court, the grounds for jurisdiction are based on 28 USCS 1346, 33 U.S.C. Section 1365(A)(2) by implication and 5 USCS 702. 5 USCS 702 provides for judicial review under the Administrative Procedure Act and was not argued in Kazmann I. 5 USCS 702 states the following:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action withing the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United

States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: PROVIDED, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or implicitly forbids the relief which is sought."

5 USCS 702 is not in and of itself a mechanism to establish jurisdiction in the District Court which would not otherwise be in its competence. International Federation of Professional & Technical Engineers vs. Williams (1974 ED VA) 389 F Supp 287, Aff'd without opinion (CA 4 VA) 510 F 2d 966. However, when coupled with a valid jurisdictional statute such as 28 USCS 1346 and/or 33

USCS 1365(A)(2), a new cause of action, complete with jurisdiction and standing, is found.

Further, plaintiff contends that the jurisdictional basis of 33 U.S.C. Section 1365(A)(2) coupled with 5 USCS 702, allowing for judicial review, would provide a basis for review by the Federal District Court. In addition, the Tucker Act may very well provide a basis for jurisdiction due to the fact that, while this is not technically a suit for money damages, it is a suit to prevent money damages, specifically, the fine being imposed on the citizens of the Parish of East Baton Rouge under the proposed consent decree. Instead of waiting for the fine to be imposed to challenge it, plaintiff is making the effort now.

5 USCS Section 702 does allow for judicial review of an administrative action (in this case, the United States Environmental Protection Agency) where

no action existed before, but it alone does not confer standing on a complainant. Sierra Club vs. Hickel (1970 CA 9 Cal) 433 F 2d 24, aff'd. 405 US 727.

Yet, in Public Citizen vs. Lockheed Aircraft Corp. (1977) 184 App DC 133, 565 F 2d 708, it was stated that the Administrative Procedure Act (5 USCS Section 702) does grant standing to a person challenging an administrative action (in the instant case it would be the United States Environmental Protection Agency) if that person suffered a legal wrong or was adversely affected by that action. Further, it was said that the plaintiff must show that the acts in question have harmed him or that he would benefit from the Court's intervention.

In the present situation, the plaintiffs are taxpayers in East Baton

Rouge Parish who will be required to bear the financial burden of paying for the new sewage treatment plants and associated construction as required by the EPA and the Clean Water Act, and, as of a recent tax election, they are no longer just paying a sewer user fee but increased sales taxes to support the construction requirements imposed by the EPA.

Surely it is the Federal District Court's duty to ensure that the EPA is complying with the goals and policies of the legislation when a complaint is filed asking for judicial review of an administrative procedure. The plaintiff and the general citizenry would benefit from the Court's intervention in reviewing legislation that creates an onerous and unnecessary financial burden on the taxpayers.

Further, the EPA has violated the legislative goals and the intent of the

Clean Water Act as stated by 33 USCS 1251. In Appalachian Power Company vs. Train, (1976 CA 4) 545 F 2d 1351, the Court held that:

> "Nevertheless, EPA is under a statutory duty to determine whether, in fact, its regulations for 1983 will 'result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants..'"

It is also within the jurisdiction of the Federal Courts to review agency action to determine if it is correct both from the substantive and procedural standpoints. See CPC International, Inc., et al. vs. Train, 1975; CA 8), 515 F 2d 1032 and Marathon Oil vs. Environmental Protection Agency, (1972; CA 9) 564 F 2d 1253.

In inquiring into the substance of the EPA action, the inquiry is limited but can be made by the Federal Courts. In Motor Vehicle Manufacturers'

Association of the United States, Inc. vs. State Farm Mutual Insurance, Co., (US Sup Ct 1983), 463 US 29, 77 L Ed 2d 443, 103 S Ct 2856, the Court stated:

> "...The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and arbitrate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' Burlington Truck Lines, Inc. vs. United States, 371 US 156, 168, 9L Ed 2d 207, 83 S Ct 239 (1962). In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' Bowman Transportation, Inc. vs. Arkansas-Best Freight System, Inc., supra at 285, 42 L Ed 2d 447, 95 S Ct 438; Citizens to Preserve Overton Park vs. Volpe, supra, at 416, 28 L Ed 2d 136, 91 S Ct 814. Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision

> that runs counter to the evidence before the agency, or is so implausible that it could not be escribed to a difference in view or the product of agency expertise. The reviewing Court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. SEC vs Cheney Corp., 332 US 194, 196, 91 L Ed 1995, 67 S Ct 1575 (1947). 'We will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discussed.' Bowman Transportation, Inc. vs Arkansas-Best Freight System, Inc., supra at 286, 42 L Ed 2d 447, 95 S Ct 438. See also Camp vs. Pitts, 411 US 138, 142-143, 362 Ed 106, 93 S Ct 1241 (1973)."

See also National Association of Metal Finishers vs. EPA, (CA 3 1983) 719 F 2d 624.

Further, the Court is entitled to review the actions of the EPA on a substantive and procedureal basis under the provision of the Administrative Procedure Act. 5 USCS 704 states the following:

> 704. Actions reviewable
> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 USCS 706 establishes the scope of the review available to the court. It states:

> 706. Scope of review
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be:
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

It is also possible, under the provisions of the Administrative Procedure Act, for the Court to suspend the action of the agency or, in this case, the effectiveness of the consent decree, while a full review is held. 5 USCS 705 provides:

705. Relief pending review When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

CONCLUSION

Plaintiff, as a citizen and taxpayer of East Baton Rouge Parish, which has been subjected to EPA orders which will cost the City/Parish some two hundred forty million dollars to execute, seeks nothing further than the opportunity to present his case, in a

public hearing, to the Environmental Protection Agency or to a hearing before a Federal District Court. At such a hearing, he believes that he can present evidence which strongly supports his contention that the massive expenditures ordered by the EPA are unnecessary and that the goals of the Clean Water Act can be better accomplished by other means. Certainly the government of the City/Parish would be the ideal party to assert these claims, but, for whatever reason, it has failed to do so. Therefore, the petitioner, as a taxpayer and ratepayer and representative of other taxpayers and ratepayers of the City/Parish feels that he should be entitled to do so since he is one of those who will ultimately bear the burden of paying the cost of the EPA ordered construction and also is one of those who has a vested interest in seeing that the goals of the Clean Water Act are

fulfilled. The plaintiff feels that he is entitled to do so under the provisions, cited above, of the Clean Water Act and the Administrative Procedure Act and that the Lower Court's decision regarding the questions of standing and jurisdiction should be reversed. Therefore, for the reasons shown in this petition, the Court is urged to grant the Writ prayed for.

RESPECTFULLY SUBMITTED:

ROGERS & CONNELLY
JACK N. ROGERS
MICHAEL R. CONNELLY
604 St. Ferdinand Street
Baton Rouge, LA 70802-6187
Telephone: (504) 344-4369
Attorneys for Petitioner

BY: Michael R. Connelly
MICHAEL R. CONNELLY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Certiorari have been served on each party by mailing same, postage prepaid, to each of the following: Tara Avery Hingle, Assistant United States Attorney, 352 Florida Street, Second Floor, Baton Rouge, LA 70801; Randall J. Cashio, Assistant Parish Attorney, 301 St. Ferdinand Street, Baton Rouge, LA 70802; Angus E. Crane, Attorney, Appellate Section, Land & Natural Resources Division, P. O. Box 23795, Washington, D. C. 20026; and William C. Bryson, Acting Solicitor General, c/o Department of Justice, Washington, D. C. 20530, on this 11th day of April 1989.

Michael R. Connelly

MICHAEL R. CONNELLY

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-3415
Summary Calendar

RAPHAEL G. KAZMANN, P. E., Individually and on behalf of all other individuals similarly situated,

Plaintiff-Appellant

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ETC., ET AL.,

Defendants-Appellees

Appeal from the
United States District Court
for the Middle District of Louisiana
(CA-87-1016-A)

(December 16, 1988)

Before POLITZ, KING, and SMITH,
Circuit Judges

PER CURIAM:*

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

This lawsuit is Raphael G. Kazmann's second attempt to prevent the Environmental Protection Agency from requiring that the authorities of the City of Baton Rouge, Louisiana and of East Baton Rouge Parish comply with the provisions of the Clean Water Act, as it relates to secondary sewerage treatment. The first suit was dismissed for lack of standing and jurisdiction on September 17, 1987, **Kazmann v. United States Environmental Protection Agency**, 669 F Supp 144 (M.D.La. 1987), and no appeal was taken.

Kazmann filed the instant action shortly after dismissal of the first suit. The present pleadings are essentially the same except for the substitution of statutory references to the Administrative Procedure Act in place of the earlier references to the Clean Water Act. Finding that the prior

judgment constituted a direct estoppel, the district court dismissed the present suit. Kazmann appeals.

For the reasons stated in the dismissal of the first suit, and those set forth by the district court in its Ruling on Motion to Dismiss the present suit entered on May 5, 1988, we AFFIRM.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
SEPTEMBER 8, 1987
PARKER, C. J.

RAPHAEL G. KAZMANN, P.E.,
INDIVIDUALLY AND ON BEHALF OF ALL
OTHER INDIVIDUALS SIMILARLY SITUATED

VERSUS CIVIL ACTION NO. 87-210-A

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, THROUGH ITS ADMINISTRATOR,
LEE A. THOMAS, AND
THE CITY PARISH OF EAST BATON ROUGE

* * * * * * *

In this proceeding, a frustrated citizen seeks to ultimately halt what he considers to be unnecessary sewerage treatment for discharge of sewage into the Mississippi River and thus terminate what he considers will then become an unnecessary sewer user fee or tax. He further seeks to represent a class of taxpayers and persons who operate businesses in East Baton Rouge Parish, Louisiana, and who pay the sewer user fee imposed by the local government.

Made defendants are the Administrator of the Environmental Protection Agency and the "City-Parish of East Baton Rouge."[1] The EPA has moved to dismiss the complaint for failure to state a claim upon which relief can be granted.

The City of Baton Rouge and the Parish of East Baton Rouge hold permits from the EPA for the discharge of sewage into the river. Acting under the authority of the Federal Water Pollution Control Act, 33 U.S.C. Section 1251 et seq. ("The Clean Water Act"), the EPA has ordered the City and the Parish to utilize what is known as secondary treatment for all sewage which is

---

[1]There is no such entity as the "City-Parish of East Baton Rouge." In 1949, the Plan of Government for the Parish of East Baton Rouge and the City of Baton Rouge became effective. That Plan consolidated some **functions** of local government but the City and the Parish continue as separate units of local government. See Plan of Government Sections 1.02, 1.03.

discharged into the River. Plaintiff claims that he and other taxpayers will bear the cost of providing such treatment facilities and that the EPA requirements will "impose and onerous and unnecessary financial burden" upon the local folks. More specifically, plaintiff alleges that use of secondary treatment "will have no appreciable effect on the water quality of the Mississippi River." Plaintiff further claims that under the Clean Water Act, the City and the Parish are entitled to an administrative hearing at which he and the local governmental bodies may demonstrate that the EPA requirements are unnecessary and unwarranted. Finally, he seeks injunctive relief pending the holding of such an administrative hearing.

Federal district courts are courts of limited jurisdiction, hence that is

always the first inquiry. The only basis for federal jurisdiction alleged in this complaint are 28 U.S.C. Section 134, The Tucker Act, and 33 U.S.C. Section 1365, the "citizen suit" provisions of the Clean Water Act.

Since this action makes no money demand against the United States, it is obvious that the Tucker Act does not provide a jurisdictional basis for it. The Clean Water Act, 33 U.S.C. Section 1365 provides:

> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf--[2]

---

[2] The legislative history of the Clean Water Act clearly indicates that the Congress did not intend to authorize class actions. Instead, only suits by any citizen or citizens acting on their own behalf are authorized. 1972 U.S. Code Cong. & Admin. News, 3746. See **City of Evansville, Ind. v. Kentucky Liquid Recycling Co.**, 604 F. 2d 1008 (7th Cir. 1979)

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator of a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

Since no allegation is made in this complaint that any defendant is in violation of an effluent standard or limitation or of an order with respect thereto, it is clear that plaintiff's

jurisdictional basis must be subsection (2). Plaintiff argues that the administrator has a non-discretionary duty to afford an administrative hearing to the City and the Parish.

The EPA argues that plaintiff lacks standing to bring this action and hence that the court lacks jurisdiction to hear it. Plaintiff essentially relies upon his claim of economic injury due to burdensome and unnecessary increases in taxes or user rates.

One's status as a taxpayer does not confer standing to invoke the judicial power of the United States except in the most narrow of circumstances, none of which are present here. See, e.g., **United States v. Richardson**, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). More importantly, however, the tax or utility rate which plaintiff here seeks to use to acquire taxpayer status,

is not one levied or imposed by the EPA. As the complaint clearly shows, the sewer user fee is a local tax levied by the City of Baton Rouge and Parish of East Baton Rouge. The EPA has no power to impose such a tax or to repeal it.

As the government points out in its brief, the legislative history of the Clean Air Act makes it plain that the Congress defined "citizen" as the term was used in **Sierra Club v. Morton**, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). See **S.Conf. Rept. No. 1236**, 92d Congress 2d Sess., **reprinted** in 1972 Code Cong. & Admin. News, 3823. To bring such an action, the citizen must seek to vindicate his own rights, not those of a third party. Here, plaintiff seeks to assert rights which he claims are due the local governing bodies, implying that the local public officials who should do so have somehow abdicated

their own duty to demand such an administrative hearing, in court if necessary. This amounts to a sort of citizen-taxpayer derivative suit brought to assert rights which the elected leaders of the community have failed to assert. Plaintiff has cited no authority which authorizes the bringing of such an action and this court has found none.

Analysis of the situation shows clearly that plaintiff lacks standing. The Clean Air Act confers jurisdiction upon this court to entertain citizens' actions brought (1) against violators and (2) for non-performance of non-discretionary duties, against the Administrator. No other jurisdiction is conferred. Since there is no claim that the city and the parish are violators, this court is without subject matter jurisdiction to hear any claim by this

plaintiff against those defendants. When the city and the parish are removed from the suit (as they would be), it becomes clear that plaintiff is attempting to assert the rights of others. Neither the city nor the parish has demanded the administrative hearing which plaintiff seeks for them. Should this court answer the only question presented by the complaint-- Does the Administrator have a non-discretionary duty to grant an administrative hearing to the city and the parish? -- then the court would truly render an advisory opinion which is prohibited by Article III of the United States Constitution.

Plaintiff may be entirely correct in his claim that the EPA is mandating superfluous treatment standards and that the local governing bodies are entitled to an administrative hearing before they can be required to provide that

treatment. But the local elected officials whose duty it is to make the decision to demand or not to demand such a hearing, have apparently decided to forego it. That is their decision to make. No authority has been presented to this court for the proposition that a citizen-taxpayer who disagrees with such a decision may supercede the local elected officials and exercise the rights of the local government on their behalf. Clearly, everyone recognizes that citizen-taxpayers may be effected in significant ways by decisions of their elected officials, but disagreement with their decisions must be registered at the ballot box, not the courthouse.

The court is convinced, after the most careful study and consideration, that plaintiff lacks standing to being this action and that consequently this

court has no jurisdiction to hear it. The motion dismiss for failure to state a claim is hereby GRANTED and this action will be dismissed.

* * * * * * * * * * *

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

RAPHAEL G. KAZMANN, P.E., ET AL.

VERSUS CIVIL ACTION NO. 87-1016-A

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

RULINC ON MOTION TO DISMISS

This matter is before the court on EPA's motion to dismiss for lack of subject matter jurisdiction, res judicata and failure to state a claim. Plaintiff has filed an opposition. There is no need for oral argument.

The salient issue presented by the motion to dismiss is whether this suit is barred under res judicata principles. This lawsuit is plaintiff's second attempt to thwart EPA's actions in forcing the City of Baton Rouge and the Parish of East Baton Rouge to comply

with the provisions of the Clean Water Act concerning secondary sewerage treatment. Plaintiff's first attempt to enjoin EPA's actions was made in **Raphael Kazmann, P.E. v. United States Environmental Protection Agency, et al.**, CA No. 87-210-A (of this court's docket). That action was dismissed by the court for lack of standing and jurisdiction. See reported decision at 669 F.Supp. 144 (M.D.La. 1987). A judgment of dismissal was entered on September 17, 1987, which is now final as plaintiff failed to appeal.

On November 20, 1987, plaintiff instituted this action against the same defendants asserting the same wrong doing by EPA.[1] In this case, however, plaintiff has substituted the statutory references to the Clean Water Act in his complaint with references to the Administrative Procedure Act, 5 U.S.C.

Section 702, et seq. Plaintiff argues that by asserting the Administrative Procedure Act in this lawsuit, he has presented a new cause of action precluding the application of res judicata. The court cannot agree; clearly the issue of standing was litigated in the first action. Any question as to the correctness of that decision should have been raised by a motion for post judgment relief or an appeal.

Although a judgment of dismissal predicated on standing is not an

---

[1]In his first suit, plaintiff sought to enjoin EPA enforcing the provisions of the Clean Water Act relating to secondary treatment to and prohibit the defendants from entering into a consent decree until an administrative hearing had been held by EPA. In this suit, plaintiff essentially seeks to prohibit the same conduct. Plaintiff erroneously claims that a consent decree was entered in late September of 1987. Clearly, these allegations are incorrect as the court has pending before it an application for approval of a proposed consent decree in CA No. 88-191-A.

adjudication on the merits, such a judgment precludes further litigation on those matters actually adjudged. **Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauzites**, 465 U.S. 694, 102 S.Ct. 2099, 2104, n.9, 72 L.Ed. 492 (1982); **Mann v. Sabella**, No. 86-3336 (5th Cir. February 11, 1988). See Moore's Federal Practice, Paragraph 0.405[5]. Since the issues are substantially identical, the prior judgment constitutes a direct estoppel.[2] Consequently, plaintiff is precluded from relitigating the same issues herein.

---

[2]In the prior suit, the court did not limit plaintiff to the jurisdictional allegations of his complaint. The effect of the Administrative Procedure Act was raised and argued therein, although not expressly noted in the court's written reasons.

Accordingly, defendant's motion to dismiss is hereby GRANTED and this action will be dismissed.

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA